

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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ROGER FREELAND, on his own behalf,
ROSELYN FREELAND, on her own behalf,
and as mother and next friend of REX FREELAND,
a minor with severe brain damage,

Plaintiffs,

vs.

Civil No. 99-1500 MV/WWD

THE UNITED STATES OF AMERICA,

Defendant.

DEFENDANT'S PROPOSED CONCLUSIONS OF LAW

1. New Mexico substantive tort law applies to the facts of this case.

2. At all times material, Defendant and its employees possessed and applied the knowledge and used the skill and care ordinarily used by reasonably well-qualified hospitals, clinics, physicians, and other health care providers of the same type and specialty giving due consideration to the locality involved.

3. Dentist Jerome Holbrook was not negligent in the care and treatment he provided to Rex Freeland.

4. Nurse Michael Steele was not negligent in the care and treatment he provided to Rex Freeland.

5. The decision to remove the endotracheal tube was appropriate and met the applicable standard of care.

6. Rex Freeland's condition is as a result of an unavoidable medical complication for which Defendant is not

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liable.

7. Nurse Steele was primarily responsible for the management of Rex Freeland's airway.

8. The United States is liable in the same manner and to the same extent as a private individual under like circumstances. Accordingly, under New Mexico law, damages are limited under the terms of the New Mexico Medical Malpractice Act, N.M. Stat. Ann. § 41-5-6 (1978) (1996 Repl. Pamp.).

9. The limitation on damages contained in the New Mexico Medical Malpractice Act is constitutional.

10. The limitation of recovery under the New Mexico Medical Malpractice Act applies to the acts of Dr. Holbrook.

11. The limitation of recovery under the New Mexico Medical Malpractice Act applies to the acts of Nurse Steele.

12. Plaintiff Roger Freeland is not entitled to recovery for loss of consortium.

13. Plaintiff Roselyn F. Freeland is not entitled to recovery for loss of consortium.

14. To the extent any damages are awarded to Plaintiffs, Defendant is entitled to an offset for any benefits paid to the Plaintiffs by any agency of the United States or through any state agency which receives funds from the United States.

15. Any damages for future medical expenses should be placed in a reversionary trust, with the United States being the

beneficiary of the trust.

16. The Plaintiffs' claim for the cost of purchasing a home is not a recoverable element of damages.

17. Rex Freeland does not have a normal life expectancy.

18. Rex Freeland's life expectancy is approximately 8.5 or less additional years.

19. Rex Freeland's median survival time is 5.1 or less additional years.

20. The cost of obtaining care for Rex Freeland in a nursing home is approximately \$88,187 to \$92,518 per year.

21. The present value of obtaining care for Rex Freeland in a nursing home is approximately \$798,252 given his life expectancy.

22. Rex Freeland will not require licensed nursing care twenty-four hours per day for the rest of his life.

23. Rex Freeland's family members can be trained to take care of him at home with assistance periodically from a skilled nurse.

24. An alternative plan for home care with family providing Rex Freeland's care would cost approximately \$104,340 to \$118,575 for the first year and \$98,640 to \$112,875 per year after that.

25. The value of Rex Freeland's lost earning capacity can be estimated variously at \$269,898 or \$67,742, using two different sets of conditions.

26. There is no value of loss of household services for Rex Freeland.

27. Rex Freeland suffered no conscious pain and suffering, and therefore, there is no recovery for same.

Respectfully submitted,

NORMAN C. BAY
United States Attorney



PHYLLIS A. DOW
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 346-7274

I HEREBY CERTIFY that on June 4, 2001, the foregoing document was mailed to counsel for Plaintiff, Stephen Moffat, Esq., Moffat & Dicharry, 1005 Luna Circle, N.W., Albuquerque, New Mexico 87102.



PHYLLIS A. DOW
Assistant U.S. Attorney

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